STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 13, 2003
v	No. 234684 Alcona Circuit Court
DANIEL JAMES CURTIS, Defendant-Appellant.	LC No. 00-010458-FC

Before: Donofrio, P.J., and Saad and Owens, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529, and accessory after the fact, MCL 750.505B. Defendant was sentenced as a third habitual offender to 25 to 40 years' imprisonment for the armed robbery conviction, and 2 to 5 years' imprisonment for the accessory after the fact conviction to be served concurrently. Defendant appeals as of right and we affirm.

This case arises out of an incident that occurred at the home of Danny and Julie Lyons in the early morning hours of December 19, 1999. On that date, Danny Lyons heard someone calling his name and pounding on his front door. Danny Lyons approached the door to investigate when defendant and two others burst through his front door wearing masks, one with a handgun and one with a shotgun. A melee ensued as Danny Lyons attempted to defend himself against the intruders. At one point Danny Lyons grabbed the barrel of a pistol one of the intruders was holding. The intruders struck Danny Lyons in the back of his head and overpowered him, then bound him with duct tape and clothing. After striking Danny Lyons on the head with a pistol, the intruders demanded that he tell them where his weekend earnings were from the store he owned. Fearing for his own safety and the safety of his family, Danny Lyons complied and told the intruders that the earnings were located on a chair in his kitchen. The intruders took the money, totaling around $14,000, and fled the Lyons residence.

On appeal, defendant first argues there was insufficient evidence to support his armed robbery conviction. "When reviewing a claim regarding the sufficiency of the evidence, this Court examines the evidence in a light most favorable to the prosecution to determine if a rational jury could find that the essential elements of the offense were proved beyond a reasonable doubt." *People v Joseph*, 237 Mich App 18, 20; 601 NW2d 882 (1999). "The elements of armed robbery are (1) an assault and (2) a felonious taking of property from the victim's person or presence (3) while the defendant is armed with a dangerous weapon." *People*

v Watkins, 247 Mich App 14, 33; 634 NW2d 370 (2001). "The offense of assault requires proof that the defendant made either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *Id*.

After reviewing the record we find there is sufficient evidence to support defendant's conviction for armed robbery. Danny Lyons testified that he was surprised by attackers who burst through the front door of his home. Danny Lyons was assaulted by the intruders as they entered his house. After the masked men bound him and struck him with a pistol, they forced him to reveal the whereabouts of the weekend earnings from his store. After locating the money, the men took the money and left. Both Danny Lyons' wife and son were also confronted by the robbers who pointed weapons at them, and both heard the robbers demanding money. Julie Lyons was also bound with clothing and duct tape.

The prosecutor also offered testimony from one of the participants in the robbery, Steven Knight. Knight testified that he, defendant, and another man, Ken Cox, committed the robbery on the date in question at the Lyons residence. At trial he provided a detailed account of the events leading up to the robbery, the robbery itself, and events occurring following the robbery. Knight explained how the three men planned the robbery at a coffee shop, how defendant found the Lyons' address on the internet using his home computer, and that defendant drove all of them to the Lyons' residence in a car containing a sawed-off shotgun, two BB pistols, a scanner, and dark clothing including ski masks and gloves. He also described how the three men donned the clothing, armed themselves, cut the phone lines to the Lyon residence and then entered the house and committed the robbery. Knight testified that after the robbery defendant drove to Knight's house where the three men split the cash and burned the checks and the bag that had contained the money in a barrel in Knight's backyard. Defendant was to be responsible for getting rid of the weapons used in the robbery. The three men met once again the following day to recount the money and redistribute the proceeds after a disagreement.

During the course of defendant's arrest and search of his home, the police located, among other items, two 4.5 millimeter Daisy BB guns, a police scanner tuned to the law enforcement frequency, and a black ski mask. After defendant was arrested he told police, and he also testified at trial that Knight and Cox were involved in the robbery, and admitted that he played a role in the robbery although stating that he only drove the get-a-way car. He also admitted that he had a police scanner and that he had used his personal computer to look up names and addresses of people on the internet in the past. However, at trial, defendant stated that he did not know that Knight and Cox were going to rob the Lyons and stated that when he accompanied them on the night in question, he had no intent to commit a robbery.

After a thorough review of the record we find these facts overwhelmingly prove defendant committed the crime charged. Moreover, they are more than sufficient to prove the essential elements of armed robbery beyond a reasonable doubt. *Watkins, supra*, 247 Mich App 33; *Joseph, supra*, 237 Mich App 20.

Defendant next argues the trial court abused its discretion when it admitted evidence of prior bad acts at trial. Defendant argues that Knight testified regarding two alleged armed robberies committed by defendant and the trial court erred when it admitted this evidence. To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection which it asserts on appeal. MRE 103(a)(1),

People v Grant, 445 Mich 535, 545, 553; 520 NW2d 123 (1994); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). This issue is preserved for trial because defendant objected to the admission of the evidence at trial on the same basis as he objects on appeal.

The decision to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000); or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000). Moreover, an evidentiary error does not merit reversal in a criminal case, unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000).

On appeal, defendant specifically argues that testimony regarding defendant's involvement in two prior armed robberies was more prejudicial than probative and tended to prove defendant's character rather than his knowledge of, or involvement in the charged crime. All logically relevant evidence is admissible. MRE 401; MRE 402. To be relevant, the evidence must be material or probative of a fact of consequence to the action. To be material, the fact must be one "in issue" or within the "range of litigated matters in controversy." *Sabin (After Remand), supra*, 463 Mich 57. However, it is settled that evidence of other crimes, wrongs, or acts may not be used to prove a person's character to show that the person acted in conformity and therefore is guilty. MRE 404(b); *Sabin (After Remand), supra,* at 56.

To be admissible under MRE 404(b), the trial court must determine that: (1) the evidence is offered for a proper purpose; (2) the evidence is relevant; (3) the probative value is not substantially outweighed by unfair prejudice. The trial court may, upon request, provide a limiting instruction to the jury. *Starr, supra*, 457 Mich 496. After reviewing the record below we reject defendant's argument that the evidence was improperly admitted. Here, the record shows that defendant stated that he did not know that Knight and Cox were going to rob the Lyons and further stated that when he accompanied them on the night in question, he had no intent to commit a robbery. Contrary to defendant's argument on appeal, the prior conviction evidence is directly relevant of proper purpose, and probative of defendant's knowledge of the robbery and moreover, that he had the intent to commit the armed robbery with Knight and Cox. Therefore, we find that the trial court did not abuse its discretion when it admitted the evidence in question. *Starr, supra,* 457 Mich 494.

Lastly, defendant argues that the trial court erred when it gave the jury a supplemental instruction on aiding and abetting but refused to re-instruct the jury regarding his mere presence theory of the case. After both parties finished their closing arguments the trial court instructed the jury. The trial court included an instruction on aiding and abetting, and then read the instruction at issue, regarding mere presence, to the jury. Shortly thereafter the jury began deliberating. At one point the jury sent the following note the to the trial court:

> If the defendant is in the vehicle and is proven to have intent of the armored [sic] robbery. Can he be made guilty of the armored [sic] robbery although he physically did not commit the assault/robbery?

In response to the question, after some discussion on the record, the trial court decided to reinstruct the jury on aiding and abetting. The defendant did not object to that instruction, however he did request that the trial court also reinstruct the jury on mere presence. The trial court disagreed and only re-read the instruction on aiding and abetting to the jury.

A defendant must request a jury instruction or object to the instructions given in the lower court in order to preserve for appeal a challenge to the trial court's decision not to give the instruction. MCL 768.29; *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909, modified 450 Mich 1212 (1995). Defendant properly preserved this issue for appeal when he requested the reinstruction before the trial court.

Jury instructions are to be read as a whole instead of extracted piecemeal to establish error, and even if somewhat imperfect, no error exists if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995); *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). The instructions must include all elements of the charged offense and must not exclude relevant issues, defenses, or theories, if there is evidentiary support. *Daniel, supra*, 207 Mich App 53. "There is no requirement that when a jury has asked for supplemental instruction on specific areas that the trial judge is obligated to give all of the instructions previously given. The trial judge need only give those instructions specifically asked." *People v Darwall*, 82 Mich App 652, 663; 267 NW2d 472 (1978).

After reviewing the somewhat cryptic language of the jury's note together with the circumstances in the case, we are not persuaded that the trial court erred when it did not reinstruct the jury regarding mere presence. The record reveals that the trial court read the note on the record, allowed both parties to comment before interpreting the language of the note, and also asked the parties to suggest appropriate responses to the note before making its ruling. After considering the arguments of both parties, the trial court was not convinced that a reinstruction on mere presence appropriately responded to the jury's question. The trial court correctly attempted to discern exactly what the jury requested, and in accordance with *Darwall, supra*, gave only those instructions specifically asked.[1] *Darwall, supra*, 82 Mich App 663. Contrary to defendant's assertions, a new trial is not warranted because no error exists. *Bell, supra*, 209

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[1] See also *People v Parker*, 230 Mich App 677, 681; 584 NW2d 753 (1998) (trial court did not err when it reissued requested instructions, but did not reinstruct jury on self-defense, which the jury had not requested); *People v Katt*, 248 Mich App 282, 310-311; 639 NW2d 815 (2001) (trial court did not err when it interpreted jury request for supplemental instructions as an indication that jury was deadlocked and declined to reinstruct jury on the burden of proof.)

Mich App 276; *Daniel, supra*, 207 Mich App 53.

Affirmed.

/s/ Pat M. Donofrio
/s/ Henry William Saad
/s/ Donald S. Owens